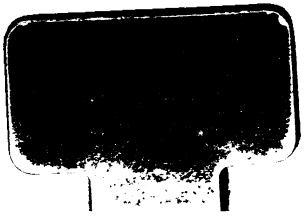

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INTRODUCTORY LECTURE,

&c. &c.

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THE ROMAN CIVIL LAW.

INTRODUCTORY LECTURE

ON THE

STUDY OF THE ROMAN CIVIL LAW,

DELIVERED IN

The Theatre of Trinity College, Dublin,

IN MICHAELMAS TERM, 1850.

BY

JOHN ANSTER, LL.D.,

REGIUS PROFESSOR OF CIVIL LAW IN THE UNIVERSITY OF DUBLIN, AND VICE-PRESIDENT OF THE ROYAL IRISH ACADEMY.

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TO

THE PROVOST AND SENIOR FELLOWS

Of Trinity College, Dublin;

TO THE BENCHERS OF THE HONORABLE SOCIETY OF KING'S INNS,

ASSOCIATED WITH THEM IN PROMOTING THE GREAT OBJECT

OF PROFESSIONAL EDUCATION;

AND TO THE MEMBERS OF THE BAR IN BOTH KINDGOMS,

I DEDICATE THESE PAGES.

DUBLIN UNIVERSITY LAW SCHOOL.

In connexion with the arrangements adopted by the Benchers of the King's Inns, the Professor of Feudal and English Law lectures on the subject of Real Property twice in the week during the College Term.

The Regius Professor of Civil Law lectures on the Roman Civil Law twice in the week during the College Term.

Decreed by the Provost and Senior Fellows, October 26, 1850.

1. Students may begin to attend the Regius Professor of Civil Law in the first Term of their Senior Sophister year.

2. To obtain credit for their first year as law students, they must attend the Regius Professor for the three terms of that year, and pass an examination in subjects to be prescribed by the Professor at the end of Trinity Term.

3. Students who have passed this examination may attend the lectures of the Professor of Feudal and English Law.

4. To obtain credit for the second year as law students, they must attend three Terms of the lectures of the Professor of Feudal and English Law, and pass an examination as before, at the end of Trinity Term, in the subjects prescribed by the Professor.

5. Students who comply with the foregoing regulations will be considered as law students of the University, and entitled to the same privileges in their Senior Sophister year which have been already given to other professional students.

6. The Law Professors shall give a joint certificate to such students as have attended for two years the lectures, and passed the examinations required by the foregoing regulations."

INTRODUCTORY LECTURE.

It has been determined by those to whom is intrusted the power of admission to the Bar, that the study of the Roman Civil Law shall form a part of the education of every law student; and the Provost and Board of our University, anxious to assist in every possible way the great object of professional education, have not alone directed their Professor of Civil Law to deliver Lectures on that most interesting branch of study, and to illustrate, as he best can, the general principles through which alone Law is, or may be regarded as, a science, but have offered to you all manner of encouragement to pursue the study with ardour and diligence. The same privileges which have been before granted to the medical and other professional students who attend the classes in which instruction is given in their particular departments, are now granted to law students. The attendance required by the decree of the Board is strict, and at the end of the Course it is determined that an Examination shall take place, on the result of which depends whether you shall be allowed credit for the attendance. Still more strict is the attendance required to enable me to give such a Certificate as the Benchers require, before you can be called to the Bar. I will read a sentence for you from their late regulations.*

* See Note A.

When I consider the difficulties of the subject to which I shall chiefly have to call your attention, increased greatly by the fact, that the Roman Civil Law has of late years been but little the subject of study in this country, I cannot but at times almost feel regret that it has not become the duty of some other, rather than myself, to direct your studies. We have no light task to perform. We—you, my friends, and I—have alike to create again in our minds the image of that mighty power, whose laws we are examining. We have to examine each particular law by its relation to a vast system, which, with all our diligence, can be but imperfectly seen. We must endeavour to see the laws of Rome as they were, not as they have been modified in accommodation to the institutions of those countries of modern Europe, of which the Roman law is the basis. In this way alone shall we detect the principle which is at the root of all law. Our great authorities, both as to the history of the civil law and as to its doctrines, are the compilations of Justinian; yet we must not allow ourselves to be deceived by the splendour which his exertions in the cause of legal science have cast round his name. We must remember, that when we think of laws we are speaking of the mutable forms in which the spirit of Justice successively seeks to clothe itself; that while there is an undying principle for ever struggling to express itself, it for ever finds language an insufficient instrument; that this, which once gave life to the letters now dead and voiceless, we are compelled to try and detect in records, of which much has become obscure, much was at all times but occasional, and, for our purposes, unimportant.

The Empire was in its decline in the days of Justinian. A country's laws, meaning by laws a larger thought than is expressed by the Latin word "leges"—one which the Romans sometimes expressed by the words "jus" and "jura,"—cannot but share the fortunes of the country; but here again we are met by the imperfections of language, and feel that

the sense of Country is lost in the thought of that vast Empire. Still,—Empire or Country,—the vast organization was falling to pieces, and this was not a period in which its jurisprudence could be regarded as in a state other than of decline.

There can be little doubt, we think, of the substantial justice of the division which a modern jurist has suggested in the history of the Roman law. It is a fanciful division, and taken from the successive stages of our human life. These fancies are not without their value in assisting the memory,—perhaps their only value,—for we should guard against being misled by the deceptive analogy into straining a metaphor too far. "Its childhood," says Hugo of Göttingen, speaking of the Roman law,—"Its childhood was from the origin of Rome to the time of the Twelve Tables. Its youth was from the time of the Twelve Tables to Cicero. Its manhood was from Cicero to Alexander Severus. And then came its old age, from Alexander Severus to Justinian."

For our acquaintance, however, with the Civil Law, in any of these periods, we are chiefly indebted to the collections made by order of Justinian. These we shall first mention in a sentence. They consist of the CODE, which contains, in an abridged form, the Imperial Constitutions from the time of Hadrian; the PANDECTS, a digest or selection from the various works of the Roman jurisconsults; after the Pandects were compiled, but before they were issued to the public, the INSTITUTES were drawn up; a work which states, in very concise, and for the most part in very clear language, the doctrines of the Roman law. A revised edition of the Code, that which we now possess, was drawn up by Justinian's orders in six years after the first. From the first we have occasional extracts in the Institutes, which do not appear in the second. This, the second edition,—"Codex repetitæ Prælectionis,"—the Pandects, the Institutes, sixteen

Edicts, and one hundred and sixteen Novellæ, or Rescripts, issued after the publication of the works we have mentioned, form what is called the " Corpus Juris Civilis."

The peculiar circumstances of Rome, with its ancient laws, framed for a small community, written in a language that had become antiquated, and incumbered, in their practical application, with forms understood by few,—with numbers too of that small community having no rights whatever capable of being enforced, except in the name and by the means of others,—created a body of men of high rank, many of them of great wealth and of abundant leisure, who made the study of the laws the business of their lives; men, for the most part, wholly distinct from the class occupied in the bustle of forensic business. The youth and manhood of every Roman was past in the public service in one form or another; and, youth and manhood thus past, it was impossible that age should be suffered to rust out in idleness. There were, in the better days of the Republic at least, active habits, which found delight in the indulgence of natural and cheerful tastes. In the Roman poets there are everywhere proofs of the enjoyment of country life,—" divini gloria ruris." I speak not of passages of formal description, but of those fragments of picture, exhibited in single happy words, which prove how lively and how true their feeling of natural beauty was. In Pliny and in Cicero we have descriptions of the villas in which they were fond of living. Numbers of these men made the Civil Law their study. It was the subject of their constant thought and constant conversations. The scenery amid which Cicero represents imagined speakers of his own day, and of days before his own, discussing subjects of philosophy or rhetoric, or of oratory, is little else than a picture of the very scenes taken on the spot, where they conversed pretty much as they are described as conversing. The dialogues themselves have very much the air of recollected conversations. Amid such scenes the

Roman nobility, "amplissimus quisque et clarissimus vir," meditated and read, and communed with each other; and when the season of business brought them to Rome, they were consulted, in every case of doubt, on the subject of their constant speculations. With our habits, it is not easy to imagine how the opinions of private men could be clothed with the kind of authority which their's possessed; but here was a people satisfied to conduct their business,—as it was at one time conducted in this country, and is still in many parts of Europe,—by laws rather than by legislation. There was among the Romans a superstitious regard for their early laws, and for the forms required by these laws to give their acts legal validity. Even with our unresting machinery of legislation there is the necessity of a continuing and almost contemporaneous exposition of every law that is enacted, in decisions of Judges interpreting its language, not without reference to the usages, and habits, and feelings of the society, whose sovereign will is expressed in their laws. That it would be wrong to call this judge-made law,—as a popular phrase, which involves, and well embodies, and happily exemplifies a very general mistake, calls it,—is exhibited by the fact, that any mistake of the judicial interpreter is at once corrected on fuller consideration. The publicity of our administration of the laws calls instant attention to such mistake; and, as has been exceedingly well shown by Dr. Longfield* in a late lecture, the consequence to the whole community of any error compels its instant correction. It can scarcely prevail so as to cause material inconvenience even in a particular case. At worst the mistaken decision is overruled. If, as frequently happens, the language of legislation, which shares the fault of all human language, in being necessarily imperfect, has been also inaccurate, a new Act

* Professor of Feudal and English Law in the University of Dublin.

of the Legislature will remove,—perhaps only vary the difficulty. If, however, with us contemporaneous interpretation of our Acts of Parliament is almost indispensable, how much more necessary was some such assistance when the written laws were written in the fewest possible words, were of ancient date, were in antiquated language? If neither of the class of corrections which we have indicated occurs, and the exposition which the Judge has given of the law is quietly submitted to, it is scarcely possible to imagine stronger evidence to prove that the interpretation—the contemporaneous interpretation as it most often is—has been true to the meaning of the law; in other words, that the interpretation is the law. From whatever cause it may have arisen, the fact is certain, that there were in Rome a body of men who made the law their study,—educated, admired, revered for their learning, and of irreproachable integrity. In their severe logic they did not allow law to be called a science. With them it was ethics; it was philosophy. Their thought was not of an external coercive power, binding society together by a will which was not the will of him from whom obedience was exacted. Law, taught in the schools as science, affirms, and for certain purposes, and in certain respects, rightly asserts for herself a domain separate from that of ethics. But the position of the Roman jurisconsults was, you must remember, that of persons giving replies to those who consulted them on questions affecting conduct in the ordinary relations of life,—relations, every one of them influenced, as all our actions are, by the institutions and regulations of the municipal society of which we are citizens, or in which we live. The questions were not always, perhaps they were not often, questions of doubtful law, or of litigated rights. Even the extracts given by Justinian from the answers may show us that the questions were just as often about rules of conduct. In answering such inquiries, there

could be nothing to lead them to consider the divisions and distinctions that occupy the jurists of a later day. The distinction between law and ethics, founded as it is on just grounds, and which we shall have occasion hereafter to examine, was one which, as far as the question of the conduct of the individual consulting the jurisperitus was concerned, it was natural and fitting that his instructor should not introduce; and accordingly, the division, though just, is scarcely adverted to in any of the "Responsa Prudentum," in what are properly the books of the Roman law.

In teaching a science, or in teaching any branch of learning as a science, we are forced on divisions and distinctions, which we sometimes find in the nature of things, more often in the nature of words which are substituted for things, and of which we are too apt to forget, that though through them alone we conduct our reasonings, their value is arbitrary and variable. We must not then expect from language a precision which it is impossible to find; at all events we must interpret all language by the purposes for which it was employed, and the answers of the jurisconsults, to persons seeking their advice, must be interpreted by the fact, that they were answers to persons requiring guidance and direction in conduct; and to divide the thought of *law* from that of *duty* could scarcely have been an honest object in such communications. No man has reflected seriously on any subject of human thought, still less on those subjects which regard the principle of obedience to law, who has not been compelled to think of our duty to others, the object of all law, as suggested and enforced by principles higher than it is convenient to refer to when we speak of human sanctions; from which, however, no one could wish, and, did he wish, no one can dissever the thought of such sanctions, knowing them to be of divine appointment. "They are ordained of God. The ruler beareth not the sword in vain. He is the

minister of God; a revenger to execute wrath on him that doeth evil." In a magnificent passage of Milton, where justice is executed on the haughty and rebellious spirit in whom the great poet has personified evil and crime, we are told, in language coloured by his recollection of the language of St. Paul, that

> "The sword
> Of Michael, from the armory of God,
> Was given him."

The Roman jurists, in their sublime speculations on society,—speculations eminently subtle at the same time that they were sublime; and let not this surprise you, as if there were a distinction in the nature of things between these different exercises of the mind,—beheld society as sustained by the one divine mind and thought—all human laws as transcripts of a law which man did not create. Society itself was, in their conception, man's natural state, for the natural state of any thing was, their philosophers taught, the state of that thing in its highest perfection; and yet of this fabric of society, independent of which man cannot be conceived as existing, and existing as man, every part is artificial. To rely on natural instinct for supporting the complicated framework of society, never occurred to these men. Their's was a truer philosophy. The *artificial* arrangements by which society, man's *natural* state, was bound together, could only be secured by laws,—as far as possible equal laws,—man's natural right. There is a passage in Cicero, in which he dwells on the pursuits of the Roman jurisconsult as the happiest and most dignified which could occupy the close of life, and speaks of his own wish for such retirement and such occupation. He quotes a passage from the poet Ennius in which kings and states are represented as consulting an oracle; and in the same way he describes the house of an

eminent jurist as visited by crowds seeking his advice and aid.

> "Suarum rerum incerti quos ego meâ ope ex
> Incertis certos, compotesque consilî
> Dimitto, ut ne res temere tractent turbidas."

"These are," says Cicero, "the words of the Pythian Apollo in the old poet; and similar," he adds, "to this is the assistance received from the jurisconsult." "Est enim sine dubio domus jurisconsulti totius oraculum civitatis, testis est hujusce Quincti Mucii janua et vestibulum quod in ejus infirmissima valetudine affectâque jam ætate maxima quotidie frequentia civium ac summorum hominum splendore celebratur."*

The exposition of a written law has been called legislation,—legislation under the name of interpretation. If the written law be so obscure as to be with difficulty intelligible,—if it be in a language known to few except the interpreters, there is some truth in this language; and the complaint resolves itself, when there is no reason to doubt that the intention of the law is truly expressed, into this, that we are governed not by words but what words mean. But let such thoughts shape themselves into what language they may, the accusation, in reality, does come to this, that the interpreter's integrity of purpose is distrusted. He is regarded as trying to evade the force of language, judging but by his own present sense of what justice requires, and escaping as he best can the words of the written ordinance. I have already said what occurs to me in reply to this accusation in the form which it often assumes. The unchanged law should be rather the object of attack than the comment, which makes it in some degree answer more nearly the demands of advancing society. However this be, at Rome

* De Oratore, i. 45.

the interpreters, who were not, we have said, at first, clothed with any other authority than that which was given them by public opinion, in virtue of their supposed knowledge, seem to have been regarded as if *they* were, in truth, the legislators; and the "Responsa Prudentum" for a while bore exclusively, and even in opposition to the written laws, the name of "Jus Civile." It is not easy to conceive the possibility of authority being thus gained for the opinions, however well-considered, of private men; but the probabilities are, that it at first arose out of the relation of patron and client, and that it was submitted to from convenience. These "responsa" were afterwards placed on a different footing, but the details of this we cannot enter into at present. In a different and a more curious way, such of the writings of the jurists, whether in their replies to cases laid before them, or in their published works, as are found in the Pandects, are given, by the fact of their being embodied in Justinian's work, the force of law. This, you will see, was giving the imperial authority, not to the works of the jurists, but to the extracts from them which Justinian's compilers adopted. All were placed by him on precisely the same level. "Omnibus," I quote Justinian's words, "unum ordinem et dignitatem parem dedimus, nulli cuipiam majore quam cæteris data prærogativa." The authority in every case alike depending solely on the Imperial Constitution, he asks, can there be room for any distinction of greater or less? To endeavour to show that their views were misrepresented, or to cite the works themselves in explanation of the author's meaning—nay, to write any comment on the Digest or the Code, was to be guilty of forgery. He who does so is "falsi et publicorum criminum indicatus et pœnæ addictus." If anything was doubtful, it was not to be cleared up by comparison of passage with passage, but the Emperor would himself interpret; meaning, of course, by rescript—

by a new law which might, and, if the experience of our times may give us any light, would require further interpretation. With Justinian's legislation we, however, at this moment, are only concerned so far as to guard against giving authority to the imperial compilations for anything like faithful quotation from the elder jurists. Justinian's Code may have done more for the falsification of the history of law than it has done for its own purpose of having an uniform system co-extensive with the Empire. His own language is this,—I translate and slightly abridge it:—" Our respect for antiquity was such that we could not think of omitting the names of the old jurisconsults; we gave the names of each of them in the paragraphs adopted from them, making alterations wherever we thought them wrong, taking out sentences, putting in sentences, selecting what was best. In short, we have given our own authority to the selection, and let nobody dare to compare our book with the originals from which it is derived, for we have changed more passages than can be numbered, all for the better, even making considerable alterations in what had received the authority of law from former Imperial Constitutions. Whatever was self-contradictory in the passages we have given from the old jurists we have removed; all is now consistent, and is to be regarded altogether as our own. 'Nomina quidem veteribus servavimus, legum autem veritatem nostram fecimus.'" For the purposes of a Code, this course, perhaps, was necessary; but we should remember, when we examine the passages of Ulpian or Paulus or Papinian for other purposes than knowing the precise state of the Roman law in the sixth century, the process which Justinian's extracts from them have undergone.

In the original constitution of Rome the business of legislation was thus conducted. No new law could be proposed except by the Magistrate; in the earliest days in

which there was anything like legislation, by the King: it was then debated in the Senate. If approved there, it was the subject of a *senatusconsultum*, and became law only on being approved by the whole assembled State. To understand what is meant by the whole assembled State,—for I wish at this moment to avoid the words "populus" and "plebs,"—we are compelled to look to the constituent elements out of which the gigantic Empire grew. The more closely we examine the structure of society, the less shall we be disposed to ascribe much to identity of blood and of race. When Aristotle sought to resolve Society into its first elements, the domestic servant or slave was, he found, part of the thought of Family; and servitude was a relation which, arising from its advantages to both master and slave, was involved in the very notion of a household. Identity of blood might exist. The slave might be the son, but it was not a portion of the thought. The relation of master and servant, then, was, in his conception, one existing from the first; and this is a relation, to say the least, as likely to arise between persons of different race as between those of the same kindred. It is important that you should remember this, for it is of exceeding moment in our consideration of laws and of their binding force, that we should distinctly remember how entirely artificial in its composition Society is,—a fact, which I cannot but think too much forgotten by those who would speculate on those subjects.

Identity of race, then, would seem not to be the sole element of Family, even in its first and rudest form; and a plausible mistake, leading to a thousand fallacies is substituted for anything that we find in actual fact, or anything that an examination of probabilities suggested to those who were best acquainted with the history of men, and with the nature and disposition of man. If we take Aristotle for our guide we shall soon see it to be a mistake to think that the

City is but an overgrown *Family;* and, as we have already said, we shall find the thought of Family itself by no means the simple one which speculative writers, deceived by popular language, have conceived it to be. We are told, for instance, of the Highland clanship, and something of the same kind in Ireland and elsewhere, and, if the theorists be right, at one time everywhere. The facts, we do not believe, anywhere support the theory. The chieftain of the clan ordinarily is not of the same blood as the great body of the clansmen. In Scotland, for instance, we do not believe that there is a single instance where the chieftain is not of a descent known to be different from that of the clansmen. Most of the chieftains are of Norse blood—successful invaders. In Ireland successive settlers adopted, to a later period than is generally thought, native names and native manners. Examine any of these cases, and you will find the Family means anything rather than the father and children of the same blood. In truth, so far is the word itself from having had its modern meaning, that it seems to have meant, in the first instance, household property; and in the next, slaves, distinguished from children, and, with beasts of the plough and such things, classed as articles of property. While among the individuals united in this mental combination, to which the name of "house" is given, some designation would be used to distinguish them, this would be confined to their necessary intercourse with each other; and their entire unimportance would prevent strangers from knowing them or any of them by any other name than that borne by the ruler of the household. Name, thus originating, would not be, as in the later stages of society, any proof of identity of blood. The analysis of Roman society, as we first find it, exhibits families united into combinations of families, the bond between whom was identity of religious rites. It is said that in Rome each family—I mean each household—had its own religious

rites. The evidence of this, as the eminent jurist, Savigny, denies the existence of "sacra familiarum," must be regarded as doubtful. I think, however, it is difficult to give any reasonable meaning, consistent with Savigny's view, to the passages by which it seems to be proved, or to some of the consequences arising from adoption or from marriage; but, however this be, there can be no doubt that of the combinations and clusters of families, "gentes," as they have been called, each "gens" had its peculiar observances. Ten of these "gentes" united formed what was called a "curia." Religion was still the bond; each "curia" had its "præses" or "curio," who presided at the religious rites, the common observance of which united the particular ten "gentes" which composed the "curia." In these rites none other participated, and thus a character of peculiar mystery distinguished each part of the Roman worship. Each "curia" had its own public hall, where its proper business was transacted, and where its "sacra" were performed. There were thirty "curiæ" in each tribe, and thirty curiones or presidents formed a college of priests presided over by the "curio maximus."

We must avoid, as far as we can, all antiquarian matter; our one object being to render intelligible the laws by which this society was held together: all controverted matter, too, we should wish to avoid. But it is impossible to move one step in this early history of Rome without finding ourselves in the fields of controversy. We are, however, safe in saying that, at the meetings of the "curiæ,"—the "comitia curiata,"—in the early days of Rome, were proposed all changes in its laws; that the Roman people assembled at these meetings gave their assent to such acts of individuals as the disposition of property by will, or that change of an individual's relation to his family and the State which was expressed by his admission, through the ceremony of adoption, into

another family. All these were, in the early stages of society, acts of legislation, or equivalent to such; and in each particular case the permission of the State was required to sanction that which affected the interests of all. There were rights of property in which the "gens" to which any individual belonged had an eventual interest, which made it necessary that they should be consenting parties to such changes as were affected by testamentary disposition or by adoption. When individual right in property was acknowledged, and the testamentary power fully established, other and less formal means were found of accomplishing the objects of its owners; or if the old ceremonies were still in some cases required, they were ceremonies dying away. The parties and their witnesses attended. Solemnities, of which the precise meaning was unknown to those executing them, and was often the subject of doubt to the jurists themselves, were gone through in the deserted assembly hall of the "curiæ,"—thirty lictors, servants of the courts, representing the thirty "curiæ."

It is impossible to discuss any portion of the Civil Law without anticipating in some degree what it will be the object of future lectures to exhibit in distinct detail. You will, perhaps, be surprised that I feel it necessary to dwell on the notions of "family," and on the original constitution of civil society. Justinian, or rather the compiler of the Institutes, in the very opening of his work, goes farther back than the analysis to which I have adverted. His definition of Natural Law (Jus naturale) is as follows:—"Jus naturale est quod Natura omnia animalia docuit; nam jus istud non humani generis proprium est, sed omnium animalium quæ in cœlo, quæ in terrâ, quæ in mari nascuntur. Hinc descendit maris atque feminæ conjugatio, quam nos matrimonium appellamus; hinc liberorum procreatio et educatio. Videmus etiam cetera quoque animalia istius juris peritiâ censeri." What-

ever fault may be found with this description of the Law of Nature, we soon find that it has not been introduced without an adequate purpose; and it is plain that those who have accused Justinian of inaccuracy, and who would persuade us that he has confused the "Jus naturale" with the "Jus gentium," have themselves overlooked the important consequences which he immediately deduces from it.

I have told you of Aristotle's view of man, and his notion that slavery existed from the first. I have told you, however, at the same time, that he regarded it as arising from mutual advantage to master and servant, one being given by Nature talents fitted for command, the other incapable of exercising command, but not unfitted for ministerial service. In this thought there is nothing that renders the state of slavery, as it existed among the ancient nations, a condition destined to continue, when Man had in more perfect forms of society arrived at his true nature,—when to Society itself, —before aptly pictured, by the Hebrew prophets, when describing the ancient Empires, in one bestial form or another,—should be given at last, in the language of Scripture, "the heart of a man." The Roman jurist had, we think, this hope; and, though slavery existed in Rome, and existed often in its most revolting forms, yet the distinction which admitted natural rights acknowledged slavery as an unnatural condition; and it was scarce possible not to regard such maxims and such distinctions as we find in the Pandects and the Institutes, as preparing for its extinction. The precepts of nature and the laws of nature, we are told, are immutable. Those which arise from the "Jus gentium," or from the civil law of any particular nation, may be altered by some new positive law, or become obsolete by disuse. And almost immediately after this proposition is laid down, we find the following definitions of Liberty and Slavery:—"Libertas, quidem, ex qua etiam liberi vocantur, est naturalis facultas

ejus quod cuique facere licet nisi quid vi aut jure prohibetur." "Servitus, autem, est constitutio juris gentium qua quis dominio alieno contra naturam subjicitur." In an after passage he tells us that in all countries masters had the power of life and death over slaves, and this he refers to the *Jus gentium*:—"In potestate dominorum sunt servi, quæ quidem potestas juris gentium est, namautem omnes peræque gentes animadvertere possumus dominis in servos vitæ necisque potestatem fuisse, et quodcunque per servum acquiritur id domino acquiri."—I. i. 8.

These definitions, taken from the books of the Stoics, would seem to prepare the way for liberty.

The law of nations would, in this case, seem to violate natural rights; but in truth, of natural, unmodified rights, man in society knows nothing. We are born into society. To the law of nature, mentioned in the passage of the Institutes that I have read for you,—a law described there as common to all that live, to other animals as well as man,—little can be referred but the instincts of self-preservation, and those by which provision is made for the union of the sexes, and the preservation of the offspring of such union. Some natural instincts supply the place of a law,—in the language of the jurists, imitate a law,—perhaps we should rather say, predict a law. There is, however, a just foundation for the analysis which distinguishes abstract rights from rights as modified by instituted laws; and, as in the case of slavery, which we have mentioned, it will be found wise not altogether to lose sight of these old distinctions. The severe and exclusive laws by which the Romans were first governed,—the fact, that within the same city were living from the earliest times two nations, as it were, possessing privileges essentially different, separated in a hundred ways, yet having perpetual occasions of intercourse,—compelled, especially from those who had to administer justice, incessant

speculation on the origin of all law; and in the effort to reconcile a narrow and insufficient body of rules, devised for a small society, with the laws rendered necessary by the wants of that increasing society, and its relations when it became the capital of the world, appears to have arisen the first conception of the system which, not only in its forms of proceeding, but in its effort, without violating written law, to administer substantial justice, has had its full development in our Courts of Equity.

What is called by the Romans man's natural law, is, we have seen, in the first institution of society, modified and controlled by the Civil Law; for the Civil Law of the Romans,—to which we give the distinctive name of the Civil Law,—was at first so called only by the subjects of Rome. "When we speak of the Civil Law," says Justinian, "we mean that of the Romans, as, when 'the poet' is said, the Greeks mean Homer, the Romans Virgil; each nation has its own peculiar laws, and each calls its own the Civil Law." There are, however, principles common to all,—the dictates, not of what he has before called natural law, but of man's reason exercised on the subject,—which he calls the Jus gentium, "quasi quo jure omnes gentes utantur."

A few instances will, perhaps, be useful to illustrate what is meant. The instinct which unites the sexes is a primary law of nature. The institution of marriage, depending on that original law which it regulates and controls, is referred to the *Jus gentium*, while many of the legal effects, and often the very validity of marriage, will depend on the laws of a particular country. Self-defence is a natural right arising from an original instinct. The raising an army for the purpose must be referred to numbers in union exercising and regulating this natural right; and the fact whether a nation is at war or not will depend on certain formalities, declarations of war, or the like, which the Civil Law of a particular

country may require. The thought of property in the same way, referred to primary instincts, is acknowledged and modified by the " Jus gentium," while each particular nation has its own regulations as to its security, its transfer, and its devolution.

This may be as good a moment as any other to warn the young law student of the danger of being misled by the alterations of language imperceptibly extending the signification of words applied first by a loose analogy to some subject not within the compass of their original meaning, and ultimately fixing them into something altogether new. This phrase of " jus gentium," and " jura gentium," you will find used by Livy and by Cicero in meanings wholly different from that of Justinian; and Justinian's use of the word has in its turn yielded to the thought of International Law, the notion most often connected with the words in modern jurisprudence.

The elementary treatise of Justinian is professedly confined to the subject of private law, which he divides into " written" and " unwritten." Of unwritten law he disposes in a sentence:—" Sine scripto jus venit quod usus approbavit; nunc diuturni mores consenu utentium legem imitantur." In the phrase " written and unwritten law," we have the same kind of ambiguity of which I have given you other instances. Much of what Justinian calls written law you will find elsewhere described as unwritten; but this will not mislead you. Some authors have chosen to describe the fixed institutes of a country as its written law, and all comment on it, and all judicial decision, however authenticated, as unwritten law. Γραφειν νομον was the language used in Sparta to express passing a law, which in the modern use of language would imply writing, and yet their laws were unwritten. In the Institutes the division into written and unwritten law regards all as written law (*scriptum jus*), except that which takes its rise in custom, a considerable part of the actual law of every

country. The compiler of the Institutes dwells on this distinction of written and unwritten law with more complacency than we think it would deserve, if the part which he refers to unwritten law was not greater than it would at first appear. The Institutes are confined to private law, and public law is expressly excluded from the work, public law being defined " quod spectat ad statum rei Romanæ." The passage from Ulpian, from which this paragraph in the Institutes is an extract, is fortunately preserved in the Pandects. It gives an extensive description of public law, which would not at first occur to one, in our days reading the sentence, which I have quoted from the Instistutes. " Publicum jus," says Ulpian, " in sacris, in sacerdotibus, in magistratibus consistit." Now, in all these, particularly in whatever relates to the " sacra," which, even when they were the domestic sacred rites of the smallest integer recognised by the State, were under the control of the pontifices, much must have been regulated by the customary law. Of unwritten law then, the nature of Justinian's subject excluding all that was to be classed with public law, whether written or unwritten, it is probable that the range was much wider than would appear at first sight; and that he is justified in a division which he adopts from elder jurists, a division which he regards as not inelegant, inasmuch as old tradition refers the original of the Roman laws to Greece, and as the laws of Athens were in writing, those of Sparta unwritten.

The written law, " scriptum jus," is divided into Lex, Plebiscitum, Senatusconsultum, Principum Placita, Magistratuum Edicta, Responsa Prudentum. In saying that the written law is divided into, or rather is derived from all these sources, Justinian is far from saying, as he too often is supposed to have said, that all have the same degree of authority. In fact, he himself speaks of some—the Edicta Magistratuum—

as having "non modicam juris auctoritatem." With respect to the "Responsa Prudentum," which stood upon wholly different ground, a similar remark is to be made. The Senatusconsulta were not, till a late period of the Roman constitution, law, in the same sense as the Leges or Plebiscita; but at all times, in certain subjects within the circle of their administrative function, their proclamations had the force of law. A passage of Dionysius states the Senatusconsultum to have been in force for a year after it was published. This answers the character of a temporary proclamation rather than a law.

All these, however, are classed with what we emphatically and distinctively term laws, and not unreasonably, considering that the Latin word "jus" expressed a combination of thoughts comprehending more than we have united into any one word. Justinian has not defined the word "jus" in the Institutes, nor do I believe that any definition of it is to be found in his voluminous compilations. Descriptions and divisions enough you will find, from which its general meaning may be inferred, not actual definition; but of "justice" his definition is "the constant and perpetual desire of giving to every one that which is due to him." I use for convenience Harris's English translation of the passage, which is not good, but for which you will probably not find it easy to substitute one more accurate. The Latin is "Justitia est constans et perpetua voluntas jus suum cuique tribuendi;" and we find soon after "Juris præcepta sunt hæc, honeste vivere, alterum non lædere, suum cuique tribuere." The unwritten law of custom, the usages of society, are in his thought a part of this law. The written laws, from whatever source derived, and of however unequal authority, constitute another part, and if we find some difficulty in assenting to a division and definition, which would, no doubt, be inaccurate, if the meaning were what our use of the word "laws" first suggests, we

have another question to ask, indeed the only one: Is there anything inaccurate or misleading in the description or division, when our thoughts are directed to what the Romans called " Jus Civile"? We limit the meaning of our author, by adjusting it, unconsciously, or in the kind of half-consciousness which we give to things which make no impressive demand on our attention,—to the words, the sounds we might rather say, of another language, and then we say that the division is illogical.

The extent of authority, however, of each of these sources of law, it will be necessary for us to examine; and to render the subject intelligible, we are absolutely required to take some view of the very extraordinary people whose image is still stamped in enduring characters on all society. The history of the Roman arms and the Roman laws is the history, if not of civilization in the highest sense of the word, as it has been anticipated in prophetic vision, and as it will at some future day reveal itself in human society, yet assuredly of civilization—European civilization, the highest form that man has yet attained. On it the image and superscription of Cæsar is distinctly to be read. It is not only that the languages and the manners of every land which the Romans possessed bear ineffaceable records of that mighty people, but, as has been distinctly exhibited by modern jurists, there was no period in the history of the great nations of Europe in which the principles of Roman law, and its very forms, did not survive. When we say that they survived, we do not mean that they survived without change. They did, however, survive, as the Roman language may be said to survive in many of the modern languages of Europe. No one sentence can be formed that does not seem as if its words were but fragments from the ruins of that noble language which the Romans made the language of legislation. Not one law can be cited affecting society to any great ex-

tent, except those connected with the peculiar tenure of landed property, which does not breathe the spirit of the Roman law. I care nothing for the class of resemblances, on which writers are fond of dwelling, or the pages which Bracton and Glanville, and the author of "Fleta," are said to have taken from the books of the civil law, and which they might have better left where they found them. I care nothing for the curt phrases which our own great lawyers were too fond of using, sometimes, perhaps, for the not very wise or very honest, though very convenient purpose, of answering a fool according to his folly, and terminating a discussion,—not much to their own honour or that of the science they professed,—by a dogma substituted for a principle, an exorcism for an argument. Such dogmas and such practice, I fear they might have found examples enough of in the books and among the practitioners of the civil or any other code of laws or body of lawyers. Sometimes, however, and, I believe, more often, learned and modest men resorted to this device for the purpose of clothing with a show of authority their own deductions from the principles of natural justice,—if they could they seized some stray sentence, little caring where it came from, so that it sounded like a proverb. These were the fancies and the fashion of the time, when great and original thinkers were fond of this ostentatious, playful, pedantry. Read any part of Lord Bacon's works, and see how often he illustrates some deepest truth by a sentence taken from every-day familiar discourse, wishing to circulate truth as if it were common-place; as, in a later day, Swift used absolutely to invent proverbs when he wished to say something so original as to be likely to be disputed if it did not assume this shape of admitted truth. I disregard entirely such instances as our great lawyers sometimes are found to exhibit of this use of the Civil Law. A sentence of Seneca

or Boethius would answer their purpose as well, and, no doubt, often did. I find some of the old writers, whose works are quoted to prove the resemblances between the Civil Law and our's, are scarcely recognised as writers of any authority. You will find an important case reported in Plowden; when Bracton is cited, "it is not," I use the language of the argument, "as an author in our laws, but as an ornament to discourse when he agrees with the law."* In similar language Glanville is dealt with. Of such coincidences as these old books exhibit, whether accidental or designed, I think nothing. I do not attach quite as much value as, perhaps, I ought, to the occasional praises which I now and then meet, and now and then hear, of the Civil Law, nor will I bring forward any of those panegyrics, partly because some of the passages in which they occur are not unlikely to be familiar to you; partly because I am not quite satisfied of the sincerity with which they have been uttered, as I see little trace of the Civil Law having been the subject of any serious study with some of those who have lavished on it these loud panegyrics; partly because, where the praise has been in name given to the Civil Law, I believe the Roman Civil Law was not meant, but some of the various systems derived from it, that prevail in one country or another, and which I rather hope than believe to deserve the praise so lavishly given. I incline to think, also, that the fact of the Roman Civil Law having been arranged and systematized, and its leading principles very distinctly stated in a good many books affecting logical precision, at a time when the student of our common law had little helps of the kind, has led to a good deal of what has been said. Still, diminish to as great an extent as you can those praises, there will remain such admi-

* Stowel against Lord Zouch, Plowden, 358, 359.

ration as Lord Brougham and Lord Campbell, men perfectly knowing the system, have expressed; there will remain a fact yet stronger than their admiration, I mean the fact of their having urged it, not unsuccessfully, on the public mind, as the proper object of study for every man who thinks of the Bar as a profession. This is no perishable praise. There will remain, too, for ever, the recorded Judgments of Lord Stowell, expressing the principles of this law in language of scientific precision. To use the words of one who was here nurtured and trained up for future eminence, who was here and everywhere admired, who is still by many of us remembered, and mourned, and loved,—I speak of North,—the reports of Lord Stowell's judgments may be almost said to be "a part of the general literature of the country." There will, I say, remain the judgments of Lord Stowell, determining rights where the most important relation of private life is affected by what would seem conflicting municipal laws; and those scarcely more important decisions of his, recognised by the world as deciding great controversies where Nations may be described as the litigating parties. There will remain the Decrees of Lord Hardwicke resting on principles of the Civil Law. There will remain the Judgments of Holt, resting on principles of the Civil Law. There will remain the whole doctrine of Personal Property, and its transmission by will, and the rules which determine the distribution of such property, where intestacy has occurred; much of this, no doubt, resting now on statute, and none of it, at any time, depending on any other principle for its support than its being recognized by a free nation as a portion of its laws—the King's Ecclesiastical Law is the language of Coke,—but still all derived from the old Roman legislation. There will remain the Commercial Law of England,—the creation of Lord Mansfield,—everywhere resting on broad principles of jus-

tice between man and man, which he said he found best illustrated in the Imperial Civil Law. But, above all, in our system of Real Property (where the old law of tenures would seem to defy its introduction), in the doctrine of uses, and in the separation of the legal from the equitable estate. In all this, in every part of the system, I trace the deeply marked lines of the Roman jurisprudence.

How the Roman law has influenced our's I hope hereafter to exhibit to you in particular detail. Our present business is with that law itself. Of the divisions of the Jus Civile, which I have given you from Justinian, it will be convenient in the first instance to consider those which most correspond with our notions of positive laws, with which, as similar in character and binding force, the Imperial Constitutions are to be classed. The *lex* is thus defined:—"Lex est quod populus Romanus senatorio magistratu interrogante (veluti consule), constituebat." "Plebiscitum est quod plebs plebeio magistratu interrogante constituebat." We had better read the rest of the paragraph: "Plebs autem a populo eo differt quo species a genere; nam, appellatione populi, universi cives significantur, connumeratis etiam patriciis et senatoribus. Plebis autem appellatione, sine patriciis et senatoribus cæteri cives significantur sed et plebiscita, lege Hortensiâ latâ, non minus valere quam leges cœperunt." The distinction which Justinian gives when explaining these words is not true of the words in their early meaning, but was the way in which they had been used by legal writers of three centuries before his time (for the sentence is transcribed from Gaius) and, in popular language, the word *plebs* had even passed to a lower meaning. Little more was meant by the words *plebs* and *plebeii*, than the poor, as distinguished from the rich. Its meaning, at the earlier period of which Justinian speaks, and when the *Plebs* possessed a power equivalent to legislation, for nei-

ther Justinian nor Gaius gives its *scita* the precise name of "leges,"—"non minus valere quam leges" is Justinian's phrase; "legibus exæquata sunt" is Gaius's,—was, as you know, widely different.

We are interested in the structure of early Roman society, chiefly as it aids us to understand their mode of legislation. It is scarce possible to resist the temptation of examining the modes in which different nations seek to come at the same result of obtaining the laws most conducive to the general welfare of the community; and the one greatest service, perhaps, which can be effected by individuals, or by institutions, is the creation or promotion of one common law of opinion, which can be chiefly, if not alone, effected by the freest discussion. The various interruptions by the discussions of the same subject—in different assemblies, in many of which were seen the same men, but in different relations to each other and to third parties,—in the same assembly at different times,—the obstacles which, in one of the Roman Comitia, the Patricians could interpose to the passing of any measure, or the transaction of any public business, by describing the auguries as unfavourable,—the delay occasioned by the "dies fasti" and "dies nefasti,"—the impediments of the intercessions of the Tribunes,—all ended in something that tended to create one body of opinion, or rather one standard of the common welfare to which all opinion would be more or less referred,—for respect to the rights and the opinions and feelings of others, was enforced by those numberless delays and debates,—and one body of law. The Roman system failed and passed through many stages, till it ended in despotism and in ruin from one want. They seem in no one part of their institutions to have even verged on the thought of the people acting through representatives, and not collectively.

There is something deeply mournful in the beautiful

opening of that most beautiful and most instructive of all books, to which we shall have numberless occasions to refer. I speak of Livy. On the eve of that usurpation in which, while all the forms of a constitution won through a thousand struggles were still preserved, the State became all in all, and the best hope which good men could entertain was the vague dream of a peace which might give some repose when the contest for empire should be terminated by the success of some one of the competitors, he tells us that he sought to forget present and approaching evils in relating the story of the Roman people from the first:—"Hoc laboris præmium petam ut me a conspectu malorum quæ nostra tot per annos vidit ætas, tantisper, certe dum prisca illa tota mente repeto, avertam." He adverts to the earlier history as mingled with fable. He relates it as he has found it told, and leaves it to his reader to set what value he may on the old legends. He then passes to his truer purpose, and what he thinks of real moment:—"Ad illa mihi pro se quisque acriter intendat animum quæ vita, qui mores, fuerint; per quos viros, quibusque artibus, domi militiæque et partum et auctum imperium sit. Labente deinde paulatim disciplina velut desidentes primo mores sequatur animo; deinde ut magis magisque lapsi sint; tunc ire cæperint præcipites; donec ad hæc tempora, quibus nec vitia nostra, nec remedia pati possumus, perventum est."

The laws of a people cannot be understood apart from its history and its language; and thus our subject embraces a wide field. We must guard, however, against the temptations which beset us on every side. We must deal with history only as it is illustrative of law; and while the most accurate and searching examination of every statement which we find in the works either of the historians or the jurists will be absolutely necessary, we must guard against the antiquarian spirit which is ever on the watch to lead the student away

into dry and desert places. We must guard also against the vapours of philology, and take care not to be deluded with the mere shadows of thoughts, sounds of words whose meaning is dead and gone, and which, when they lived, were at best but phantoms of abstraction, or, in Bacon's more accurate thought,—phantoms of phantoms, for the notions themselves which Words expressed were often, in Bacon's language, " confusæ et temere a Rebus abstractæ." In speaking of the delusions of words, we may be allowed to cite a poet, and say that

> " The Spirit that bideth by himself
> In the land of mist and snow"

has had strange pleasure in playing tricks on our German friends; and there can be no doubt that their practice of conjuring up the ghosts of dead words has been carried too far, and that in examining the structure of language they have now and then forgotten, or seem to have forgotten, the purposes for which language was used by articulately speaking men. To destroy the living frame of language, and resolve it into the dust out of which it was created, is, for most purposes, carrying analysis too far. Do not mistake me as disposed to underrate the importance of what the antiquarian acquires or inherits. Do not mistake me as disposed to take a low estimate of philology. Both are unspeakably valuable; both are absolutely necessary for us, and little of much account to us has been yet done in either, except by Continental scholars. But they are in their nature ministerial, and I would guard you against their usurpations, not forbid their use. Their very disposition to usurp what is not their's, and never can be their's, is reason for our distrust. Are they in their nature less servile because they have never done good service? Will they, properly employed, be unserviceable because useless or troublesome before they have been disciplined and brought to good? They are slaves, who have not

as yet found a master, or who have fled from their proper service. Reclaim them, restore them, render them useful. They are in their nature slaves, and they would be despots. I mean they are essentially ministerial, and in using the words "slaves" and "servile" in this way, I am not in truth borrowing a metaphor from a condition of human society, and by implication admitting my approval of such condition, but using the words in a truer application than could ever have been made of them when applied to individual men, when I appropriate them to abuses of particular faculties of the mind, which nature has in all men made inferior and subordinate to the whole mind, and when I endeavour to press upon you that the busy restlessness or ill-directed industry of these inferior faculties, should not be suffered to assert a province not properly their's, and thus destroy the liberty of the entire man. They are in their nature servile,—as Caliban and Ariel were, before Prospero had landed on their island, and as they continued when made subject to his dominion. Without such servants the island could never have been what it became in the hands of the benevolent magician. Such instruments, as the misshapen Drudge, who thought all things should for ever remain as they were, who worked blindly on, not sympathizing with any one of his master's purposes, living in his traditions of the days of Sycorax, and her god Setebos, and regarding all good done as a wrong offered to his old claim of ancestral right,—and the winged meteor of Fancy,—I had almost said, the Spirit of winged words, whose very life is perpetual change,—were alike indispensable, and may, for the purpose of our illustration at least, be regarded as typifying the lubber and limber elves of Antiquarianism and Philology, whose services you will require, but whose usurpations you must resist.

Your's must be no partial or exclusive study, and the books with which you are already acquainted are those to

which I would again direct your careful attention. To form anything of a clear conception of the early Roman institutions it will be absolutely necessary for you to examine whatever traces are to be found in Livy, in Dionysius, and above all, in Cicero, with such investigations as the researches of Niebuhr supply. It is not possible to have studied Niebuhr without concurring with Arnold in the feeling that, by incessant study of all that remains of ancient literature illustrative of the subject, he had acquired on the subject of Roman constitutional law a tact to which Arnold gives the name of Divination.

It is curiously confirmatory of what Arnold says, that points which Niebuhr inferred from very doubtful passages of Dionysius, were proved to be right by a discovery of Cicero's book, "De Republica." To a student of Civil Law, still more to one who makes general jurisprudence his study, I know of no book of the same value as Niebuhr's Roman History; and I do not regard its chief value to be what it has rescued from the dominion of fable and popular romance, and added to the domain of history; but more, far more than this, I regard the introductory chapters of his work, exhibiting the states of society in the early Greek colonies, with which Rome must be classed, and the forms into which society had past in the Italian Republics of the Middle Ages. From each of these sources, much more from the latter, and the analogies thereby suggested,—from the PAST, out of which Rome grew, from the FUTURE, which in great part Rome created, Niebuhr infers, through the almost miraculous instinct of genius, and with what often approaches the certain demonstrations of the severest science, the actual intermediate state of constitutional law and government. He has been said to have destroyed the early Roman history. I am not sure that there is much meaning in this. Livy, no less than he, re-

lated what are called the facts of the early Roman history, in the spirit of one telling an old story of impossible romance; but from these early legends he has succeeded in extricating something, not perhaps of absolute fact, if this word is to be confined to details of actual incident, but of conditions and relations of society, to enable us to learn which history is chiefly valuable.

At some future time, most probably at our next lecture, but as soon as it is at all possible, I shall point out some books for the purpose of directing your studies. At the moment there are difficulties, as I do not know any modern book that would quite answer the purpose, and the older treatises, which are used in Scotland and on the Continent, however useful they may be to the natives of the countries for which they were drawn up, are inconvenient, and may mislead, as they give not the Roman Civil Law, but the Roman law adulterated with the modern law of some particular country. Our best and safest course, that which is likely to be most useful to you professionally,—to such of you, I mean, as are law students,—and which also connects itself most fitly with the general purposes of academic education, of which I trust I shall not lose sight, is, that we should in the first instance make ourselves acquainted with the authentic books of the Civil Law.

The Statutes of Cambridge, and, I believe, our's, direct the first year of the law student's course to be in the Institutes of Justinian. This is mentioned in Bishop Hallifax's Elements of the Civil Law. I had not known, or I had forgotten the fact; but, without saying that we should be bound by the modes of teaching of old time, I am not sorry to find that what, without any knowledge of the old regulation, I had satisfied myself would form the best introduction to our studies, has also the sanction of venerable authority. In the University of Edinburgh there are two classes of Civil

Law; one in the Institutes, another in the Pandects. I should hope that, making the Institutes our class-book, I shall be able to bring before you much illustrative matter from the Pandects and the Code, and, as falling in best with the arrangements in connexion with which important privileges are given by the College to law students who do not properly belong to it, and who may wish to attend these classes, I shall try to complete the course of instruction within a year.

I cannot be without some anxiety as to the result of this experiment in education. I cannot but feel that on our first success in this effort to aid by professional instruction the progress of the law students, infinitely more is at issue than would at first appear. To the Benchers of the King's Inns the profession and the country are deeply indebted, and we must not disappoint their hopes. Of the University it is, perhaps, unbecoming here to speak; still I cannot but say what I most deeply feel, that of all the institutions of the country, it alone has been at all times true to its trust;—at all times;—never, surely, more than at the time in which we live, when there is no educated man in Europe who has not received instruction from the great men whom we have still among us, and from our illustrious dead; great men, whose names are so familiar here that we forget their greatness,—forget that their names are everywhere familiar. Our University has, I say, at all times since its foundation, truly aided the cause of education; and it is with a feeling of delight that I see in the new Colleges one distinguished man after another, most of whom we have educated, connecting themselves with those rising establishments, and furthering the good cause of education. I have read with exceeding pleasure and instruction a published lecture by Mr. Mills, of Cork, on the subject of general jurisprudence. I must fear for myself; I cannot fear for the

cause of legal education; in particular, I cannot fear for you, when I remember those to whose courses of instruction you must pass as each successive class moves onward. The admiration and delight,—more measured words would not express my feeling, — the admiration and delight with which I have heard some of the lectures now being delivered at the King's Inns, and which cannot be wholly without fruit in the case of the dullest and most inattentive hearer, are to me evidence irresistible of the benefit which may arise from the system. The strong sympathy between all who are in any way connected with this course of instruction, and the determination of each and all to do whatever all and each can do to promote the common object, compel me to believe that we must succeed.

I place as little faith as any one can on the mere effect of lectures. By themselves they can do nothing, or next to nothing. By lectures, if lectures are only formal prelections, nothing can be done. If any one thinks that details of practice cannot be taught to such an extent as to be of any great use, he will not find me very anxiously opposing his views. But to assume that our course of instruction is by professional lecture alone, is greatly to mistake. In the classes at King's Inns, the more formal lectures, to which the public is admitted, are followed by instruction given to the class in private. The University Professors endeavour to instruct by prelection and by class lectures, and we have examinations testing the progress of the students.

I think the persons who distrust the system of lectures ought to remember that from courses of lectures delivered from public chairs, many admirable works have had their origin: — Adam Smith's — Ferguson's— Reid's — Dugald Stewart's—Coleridge's. There is Merivale's book on Colonization. There is Miller's, who occupied your chair of History. And this has been the fact in the case of Law, as

well as everything else. The name of Blackstone must have long ago occurred to you all. Sullivan's book on the Feudal Law, a volume often mentioned with praise, grew out of lectures delivered here. From lectures delivered here, Browne's several works on Civil Law, on Ecclesiastical Law, and on Admiralty Law, were formed. A system of teaching, out of which well-arranged text-books have grown, cannot be vicious. The books never would have existed but for the lectures, and the lecturer continues to teach wherever his book is read.

The evidence taken before Mr. Wyse's Committee on legal education gives us a detailed account of a law school of private foundation in Dublin. It would be ingratitude to be silent on the subject of the successful effort made in Mr. Kennedy's "Institute" to assist the education of law students. I have heard lectures at that school from distinguished men,—from Mr. Napier,—from Mr. Whiteside,—from Dr. Longfield,—from Mr. Molyneux, who now fills one of the Law chairs in the Queen's College at Belfast,—from Mr. Barry. There, too, I heard an instructive discourse on the subject of evidence, or rather on the subject of the duties of counsel with respect to examining witnesses, from the Archbishop of Dublin. I mention this as the strongest evidence of what such men think on the subject of instructing the law student by means of lectures. I am the less anxious to urge this on you, because it has been well argued in Mr. Joy's important letters on education for the Bar.

It is impossible that any such course of professional education as is contemplated by the University and by the Benchers, can be commenced without having difficulties of one kind or another to encounter. It is natural, perhaps, that I should think most of those which affect the peculiar department assigned to myself. If it seems to have less practical bearing, and therefore can scarcely be expected to

engage the time and attention of men about to take part at once in the actual business of our courts of law, I have at all events the satisfaction of having, as my peculiar class, those who will not, for the most part, be called to the Bar for some three or four years; and, what is also of moment, who have not yet forgotten the books to which, even more than what are properly law books, I shall be compelled constantly to refer. I must often call your attention to passages, perhaps familiar to you, but which, in the illustrations they occasionally receive from the Roman law, or give to it, cannot be supposed to have occupied you. What is familiar will for a while be likely to deceive by its very familiarity, and by its being for the first time exhibited in connexion with objects which you have not before seen. The process must be gradual and slow before we are quite at home "in light that counterfeits a gloom,"—but one by one we shall, I trust, begin to distinguish objects,—and see them in something of their true position. Their relations are what we are most concerned with, and these cannot possibly be understood without more of inquiry, more of attention than can be expected, or, at all events, than will be given by men advanced in life, and occupied with its duties. It is to me a source of great delight, my one only hope for the accomplishment of the task intrusted to me,—for the accomplishment of that yet higher task, which in each humblest man's imagination his own mind will present to him as possible to be accomplished,—that to me is confided, at this best moment of their lives, the opportunity of in some slight degree aiding by suggestion the studies of the young. Without you, without your fixed attention,—nay, without your generous confidence in me and my earnestness,—we can do nothing. Give me that attention, and I feel that much, that more than I venture to predict will be done. Were you men advanced in life

I could do little more than, perhaps, now and then excite some feeling of interest by what I might chance to recall to your mind of old and half-faded recollections. I could hope little sympathy; I could neither give nor receive instruction. I feel myself fortunate, too, in another incident, as well as in the mere fact of your youth. If I did not regard you as already trained and disciplined by accurate science, I should have little hope of that fixed attention, without which nothing can be learned. I shall do all I can distinctly to communicate, what I shall do all I can myself distinctly to understand. You are not to expect from me formal language,—our business being, now and at all times, to break up the false associations which language is for ever creating. I shall, in the plainest words by which the purpose can be effected, communicate to you all I can of the Roman laws and constitution. In such communication it will be wholly impossible not to consider numbers of the questions which modern writers on legislation have discussed. The principles which such questions involve will be best learned for our purpose through such illustration as they receive from the laws and legislation of the ancient nations, and the avoidance of all that may have any peculiar reference to the circumstances of modern society. I shall do what I can, in building up these old republics, to rest on sure foundations; but if we are at times unable to ascertain precise relations, if there be chasms which the imagination must arch over, I feel as if, even in those cases, Aristotle and Plato and Cicero are our surest guides; may I not dare to add Virgil, for I have myself learned from him very much of what early society and early religion was; and I think the picture of the Trojan settlement in Italy one which —not, of course, for its facts, but for its truth to what must ever occur in colonization founded on the principles universal among the ancients—is above all praise.

I cannot regard our studies as disconnected from moral science. The Civil Law is taught in Cambridge as a branch of Ethics. I feel too that we cannot move one step without the great classical writers. If we, in truth, devote ourselves to the study, we shall find it anything but harsh and rugged. I do not know whether Cicero's Offices forms a part of your College course of studies; I hope it does; but if it does not, I should, on the authority of Locke, recommend it to you; he wishes it to be the first book put into the hands of a young man studying the Civil Law. He mentions some other books which, though valuable, are not in our day of the importance they were when he wrote; but by such studies he thought a man would be best instructed in the natural rights of men, and the origin and foundation of society, and the duties resulting from thence. "This general part of civil law and history"—I quote Locke's words—"are studies which a gentleman should not barely touch at, but constantly dwell upon and never have done with. The Civil Law concerns not the chicane of private cases, but the affairs of civilized nations in general, grounded upon principles of reason." Locke's was an eminently practical mind, and I should do injustice to his sound good sense if I did not state that he adds:—"A young man so instructed we may turn loose into the world, with great assurance that he will find employment and esteem everywhere."* From Locke let me transcribe another sentence: "Law, in its true notion, is not so much the limitation as the direction of a free and intelligent agent to his proper interest; and prescribes no further than for the general good of those under that law. Could they be happier without it, the law, as a useless thing, would of itself vanish; and that ill deserves the name of confinement, which hedges us in only from bogs and precipices. So that, however it be mistaken, the end of law is not to

* Tractate of Education.

abolish and restrain, but to preserve and enlarge freedom; for, in all the states of created beings capable of laws, where there is no law there is no freedom."*

I have said that, for the purposes of investigation, for the purpose of self-instruction, for the purpose of the instruction of others, we are often compelled to think of law and ethics as if they were in nature distinct, to tear asunder that life of all that is within us and around us, parting into separate faculties the mind, which is one, and into separate sciences, science which is one; but remember, I entreat you to remember, that these divisions, that these partitions, absolutely necessary to be made, are divisions and partitions made by ourselves, and have no existence in things themselves. The old jurists were not wrong when they refused to separate by any essential distinction the notion of conduct and that of law. To regard the distinction as one having any other foundation than that which we have stated, would be to dethrone the principle of justice and to dehumanize man.

Our first thoughts of law, before it becomes a matter of speculation with us, are connected with its restraints, not with the advantages derived from these restraints. As far as the law is from within,—the voice of God echoed in the human heart,—a principle co-existent with man, susceptible of new development with each advance of civilization,—it is a language pointing out our own duties, not suggesting to us the rewards which arise from their performance. As far as it is from without,—the imperative language of the legislator, addressing all, regarding all as possible offenders,—its language is necessarily of menace. The sanctions, which it proclaims as guards of its decrees and ordinances, are punishments, not rewards. The imagination is seized and

* Of Civil Government.

pre-occupied by this language. We think of law but in its terrors. We do not remember that by it, and by it alone, can Society, with all its artificial relations, subsist. We forget that it is the protection from the violence of others which renders possible for us the indulgence of the thousand almost capricious enjoyments which each day brings round us in increasing abundance. What hundreds and thousands are there who live happily and peaceably, and yet whose happiness and whose peace would be wholly impossible but for that unseen dominion of law which prevents any interference with their comforts, while they move on within their unambitious circle of domestic duties, quiet enjoyments, and inoffensive hopes. They have known and obeyed law under the name and with the feeling of religion. When we think of the wickedness of men, of the inordinate passions everywhere at work, the possibility of society continuing to exist, for the most part progessive too in good,—for such, with occasional and doubtful exceptions, is the history of man,—we think of ourselves and of society as if there was for ever going on around us—as there is—the agency of God, which we at times almost see visibly revealed. There is a passage in the Hebrew Scriptures which from my earliest childhood always impressed me as one of singular beauty. Elisha is in a situation that seems of great danger. A hostile army encompasses the city where he is, and he is the object of their leader's vengeance; "and his servant said unto him, 'Alas! my master, how shall we do?' And he answered, 'Fear not, for they that be with us are more than they that be with them.' And the Prophet prayed and said, 'Lord, I pray Thee to open the eyes of this young man;' and he saw, and behold the mountain was full of horses and chariots of fire round about Elisha."

NOTES.

NOTE A, Page 9.

ABRIDGED extract from regulations issued by the Society of the Benchers of King's Inns.

LEGAL EDUCATION.—KING'S INNS.

Two Professorships have been established—one of the Law of Personal Property, Pleading, Practice, and Evidence.

The other of Constitutional, Criminal, and other Crown Law.

In selecting the above subjects for their Professors, the Benchers had regard to the two Law Professors of Trinity College, Dublin, and to the enlarged course of legal education to be pursued in the University.

Edmund Hayes, Esq., LL.D., has been elected Professor of Constitutional, Criminal, and other Crown Law; and John Hastings Otway, Esq., Professor of Personal Property, Pleading, Practice, and Evidence, for the next three years.

Each Professor is to give an annual course of lectures, divided into three sessions. The first, or Michaelmas session, to consist of *at least* twelve lectures; the second, or Hilary session, to consist of *at least* twelve lectures; and the third, Spring session, to consist of *at least* fourteen lectures. Two lectures by each Professor to be delivered in each week; each Professor devoting to his class two hours—from four to six o'clock, P. M.—occupying a portion of that time in delivering a written lecture, and the residue in examination, explanation, or discussion.

The lectures are to be open to the Public.

Every student admitted into the Society after the first day

of Trinity Term, 1850, if a graduate of the University of Dublin, Oxford, Cambridge, or London, shall, as a condition precedent to his being called to the Bar, produce certificates of his having attended two complete courses, *at least*, of lectures, viz.—One complete course of lectures of any two, at his option, of the four Law Professors, namely, the Law Professors of the University of Dublin and those of the King's Inns, and *at least* five-sixths of the lecturcs of each session or University Term.

Every student admitted into the Society after the above date, if not a Graduate of one of the said Universities, shall, as a condition precedent to his being called to the Bar, produce certificates of his having attended four courses of lectures, viz.—One course of the lectures of each of the said four Professors, and at least five-sixths of the lectures of each session or University Term; in such manner, however, that every *such* student shall be engaged not less than three years in the study of the law in Ireland, exclusive of the two years necessary for keeping terms in England; in every one of which three years, one complete course of lectures, *at least*, must be kept.

King's Inns, October, 1850.

NOTE B, Page 19.

The *Responsa Prudentum* stood on wholly different grounds at different periods of the Roman constitution. In the days of the Republic they rested on the individual authority of the jurisconsults. In the early days of the Empire, the privilege of giving opinions was confined by imperial constitutions to persons selected for this duty; and the opinions were made binding on the Judices, who were judges, not of the law, but of the facts of each case. The extracts which Justinian inserted in the "Digest," which we must suppose to have been law before, remained law by being so inserted.

The following passage from Hobbes, though, to say the least, inaccurate, contains much worth reflecting on:

"*Responsa Prudentum* were the sentences and opinions of those

lawyers to whom the Emperor gave authority to interpret the law, and to give answer to such as in matter of law demanded their advice: which answers the judges, in giving judgment, were obliged by the Constitutions of the Emperor to observe; and should be like the reports of cases judged, if other judges be by the law of England bound to observe them; for the judges of the common law of England are not properly judges, but jurisconsults, of whom the judges, who are either the Lords or twelve men of the county, are, in point of law, to ask advice."—*Hobbes, Leviathan*, Book ii. 26.

NOTE C, Page 21.

See this proved, as to Ireland, in the North British Review, November, 1849.—North British Review, vol. xii. p. 44, &c.

NOTE D, Page 32.

In a lecture lately delivered by Professor Otway, at the King's Inns, he traces the history of the Civil Law in England. In his masterly sketch he attributes its chief effect on our laws to an indirect and unacknowledged influence. "Our lawyers professed to glory in their ignorance of its principles and its terms. But the leaven had worked, and its effects could not be detached from that with which it had naturally and most controllingly assimilated."—*Professor Otway's second Lecture.*

NOTE E, Page 34.

See Institutes, ii., 4. See Gilbert's Law of Uses, page 3; and compare Bacon's Reading on the Statute of Uses, Rowe's Edition; and see Rowe's Note.

NOTE F, Page 41.

The other chair of Law, at Belfast, is filled by Mr. Hancock, the Whately Professor of Political Economy in Dublin University.

THE END.